

SERVED: May 6, 1992

NTSB Order No. EA-3543

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 16th day of April, 1992

Application of George Sandy for
an award of attorney and expert
consultant fees and related
expenses under the Equal Access
to Justice Act (EAJA).

Docket 91-EAJA-SE-9513

OPINION AND ORDER

Petitioner has appealed the initial decision issued by Administrative Law Judge Jerrell R. Davis October 24, 1989.¹ In that decision, the law judge partially granted petitioner's petition for fees and expenses in connection with defense of an action brought by the Administrator and withdrawn before the hearing. The law judge reduced the sought compensation for consultants' fees.

We deny the appeal. We will, however, modify the law judge's calculation of the consulting fee award to ensure compliance with 5 U.S.C. 504(b)(1)(A).

¹A copy of that decision is attached.

Petitioner sought recovery of all assessed consulting fees, which were charged at the rate of \$95 per hour.² In his initial decision, the law judge found, citing Application of Waingrow, 5 NTSB 372 (1985), that consultants' fees are capped by law. Absent any evidence on the subject from the parties, the law judge stated that the statutory cap was now \$260 per day, or \$35 per hour. (The basis for his conclusion is not given.) Applying that hourly figure, the law judge ordered an award for consulting fees in the amount of \$1,522.50 (43.5 hours x \$35 per hour), reduced from the \$4132.50 sought.

On appeal, petitioner continues to urge application of the \$95 rate. He argues that this amount is reasonable given the work done, and meets the standards provided in 49 C.F.R. 826.6(c) and (d).³ He suggests that Waingrow, supra, and Application of Joseph S. Sottile, Jr, 4 NTSB 1217 (1984), were decided based on inadequate records (FAA's maximum compensation amount for expert witnesses not being seriously challenged), and should not be extended to support the law judge's conclusion. Alternatively, he urges remand to the law judge for the purpose of discovery regarding FAA compensation for expert witnesses.⁴

²There was no dispute as to other categories of fees and expenses, or the number of consultants' hours for which compensation should be paid. Thus, the only issue on appeal is the amount of the award for consulting fees.

³These rules contain criteria (such as prevailing and customary rates) for judging the reasonableness of fees sought.

⁴Petitioner filed discovery requests in connection with his appeal, and a request for a continuance pending completion of
(continued...)

The Administrator replied, noting that Waingrow and Sottile are premised on 5 U.S.C. 504(b)(1)(A). That provision reads:

no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved

Further, P.L. No. 101-164, Title III, Section 304, 103 Stat. 1069, 1092 (1989), the 1990 DOT Appropriations Act, provides that the agency may use funds to employ experts and consultants, "but at rates for individuals not to exceed the per diem rate equivalent to the rate for a GS-18." The Administrator states that the per diem rate for a GS-18, calculated based on an hourly wage, is \$299.76. He notes that the highest rate currently paid by the FAA is \$275 per day. Converted to an hourly rate of \$34.38, petitioner would be entitled to and should be awarded \$1495.53 for consultants' fees, rather than the \$1,522.50 calculated by the law judge.⁵

⁴(...continued)
that discovery. The requests sought information on FAA compensation of expert witnesses. The Administrator replied in opposition, and the request was denied by our General Counsel, who correctly noted that our EAJA rules, at 49 C.F.R. Part 826, do not permit discovery on appeal from an initial decision.

⁵Technically, the Administrator is seeking affirmative relief and should have appealed from the initial decision. While we do not condone his failure to do so, we will take the exceptional step of considering the matter on the merits because it is clear that FAA would violate the statute if it paid the amount set by the law judge.

On another procedural matter, we will grant the Administrator's motion to strike petitioner's response to his reply. Petitioner has not shown good cause, as required by 49 C.F.R. 821.48(e), and replies to replies are disfavored. We
(continued...)

Petitioner's analysis of case law is in error, and his other arguments are not well taken. The law judge cited Waingrow for the proposition that experts' fees are statutorily capped, not for the proposition that \$260 per day or \$35 per hour should be used. Petitioner ignores 5 U.S.C. 504(b)(1)(A), and our identical rule at 49 C.F.R. 826.6(b). The subsection (c) and (d) rules offer guidelines in analyzing fee requests for amounts below any statutory caps; they do not supersede subsection (b). Further, petitioner's extended attack on the use in Waingrow and Sottile of a \$245.36 daily rate is misplaced. That rate is irrelevant to this proceeding, 7 years later. What is relevant is the GS-18 per diem rate and the rate the FAA now pays its witnesses -- information the Administrator has provided and on which we may rely. To the extent petitioner challenges these cases' use of the per diem rate to calculate an hourly rate, we note that this practice results here in a difference of only 47 cents.⁶

Consistent with statutory requirements, the initial decision will therefore be modified to reduce the award for consultant fees to \$1495.53, thereby lowering the total award by \$26.97. We decline to remand the case for the purpose of discovery by

⁵(...continued)
nevertheless note that his suggestion that the FAA's \$275 per diem rate is instead a per "function" rate borders on the absurd, and has no legitimate basis in the Administrator's pleading.

⁶Dividing 43.5 hours by 8 to produce the number of days equals 5.44. Multiplying 5.44 days by \$275 per day equals \$1496, as compared to \$1495.53.

petitioner regarding FAA's expert witness/consultant rates. Good cause for remand has not been shown. Petitioner had a full opportunity to investigate these matters when he initiated this proceeding. The existence of a statutory cap based on agency practice was clear at that time, as were the issues of fact such a cap raises.⁷

ACCORDINGLY IT IS ORDERED THAT:

1. Petitioner's response to the Administrator's reply is stricken;
2. Petitioner's appeal is denied; and
3. The initial decision is modified to reduce the total award by \$26.97, to \$4665.80.

COUGHLIN, Acting Chairman, LAUBER, KOLSTAD, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁷We also note that, were we to remand, there would be the potential for a reopening of the issue of the consultants' total hours, which appear quite extensive, considering the work performed.